

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1150

To Be Argued By
Stanley S. Arkin
Peter Fleming, Jr.

UNITED STATES COURT OF APPEALS
For the Second Circuit

United States of America,

Appellee,

against

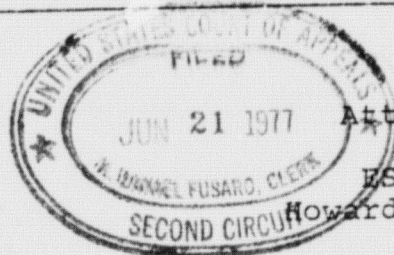
AMREP Corporation, RIO RANCHO ESTATES, Incorporated, ATC REALTY Corporation, Howard W. Friedman, Chester Carity, Henry L. Hoffman, Daniel Friedman,

Defendants-Appellants.

Appeal from Judgments of the United States District Court for the Southern District of New York

JOINT REPLY BRIEF FOR DEFENDANTS-APPELLANTS
AMREP CORP., RIO RANCHO ESTATES, INC., ATC REALTY CORP., HOWARD W. FRIEDMAN, HENRY L. HOFFMAN, CHESTER CARITY and DANIEL FRIEDMAN

Stanley S. Arkin
Mark S. Arisohn
Lee Cross
Of Counsel



Stanley S. Arkin, P.C.
Attorneys for Defendants-Appellants
AMREP Corp., RIO RANCHO ESTATES, Inc., ATC REALTY Corp., Howard W. Friedman, and Henry L. Hoffman
600 Third Avenue
New York, New York 10016
(212) 869-1450

Peter Fleming, Jr.
John E. Sprizzo
Eliot Lauer
Of Counsel

CURTIS, MALLET-PREVOST, COLT & MOSLE
Attorneys for Defendants Chester Carity and Daniel Friedman
100 Wall Street
New York, New York 10005
(212) 248-8111

Arthur L. Liman
Robert S. Smith
Robert Abrahams
Of Counsel

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
Of Counsel for Defendants-Appellants
AMREP Corp., RIO RANCHO ESTATES, Inc. and ATC REALTY Corp.
345 Park Avenue
New York, New York 10022
(212) 644-8000

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P/S

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 77-1150

UNITED STATES OF AMERICA,

Appellee,

v.

AMREP CORPORATION, RIO RANCHO ESTATES, INC.,
ATC REALTY CORPORATION, HOWARD W. FRIEDMAN,
CHESTER CARITY, HENRY L. HOFFMAN, and
DANIEL FRIEDMAN,

Defendants-Appellants.

APPELLANTS' REPLY BRIEF

Preliminary Statement

The prosecution's brief is an attempt to make this Court forget that the case against appellants, as it was submitted to the jury, was based entirely on the following two statements:

1. That land in Rio Rancho was a good investment; and
2. That Albuquerque could only grow to the northwest.

The issue at trial was whether the above two statements were false and were made by the appellants without an honest

belief that they were true. The issue was not whether there was a ready resale market for Rio Rancho land; the prosecution never introduced one scrap of evidence that any appellant ever said or authorized anyone else to say there was a ready resale market. The issue was not whether salesmen employed by the corporate appellants on occasion used high-pressure sales tactics; aggressive salesmanship is not fraud. Yet the prosecution understandably prefers, as it did at trial, to discuss these inflammatory subjects while virtually ignoring the two statements for which the appellants were convicted.

We shall demonstrate in this reply brief that the arguments advanced in the prosecution's brief are unsound, and that the judgments of conviction must be reversed. Before doing so, however, we must respond to the prosecution's statement of the facts.

Reply to Statement of Facts

In protracted trials especially, verification of the evidence by detailed review of the trial record is difficult. Not without reason, there may well exist a tendency to rely upon the government for an accurate recitation of the facts. We respectfully submit, however, that the prosecution's 153-page brief in this case does not deserve such reliance. The prosecution presents what it wishes this case were about, rather than what the evidence showed.

We list below numerous distortions of the evidence and flat misrepresentations contained in the prosecution's brief. Two, however, are of particular importance. Throughout its statement of facts and argument, the prosecution says or implies: (a) that the appellants promised purchasers a ready resale market; and (b) that the defendants never intended to develop fully the Rio Rancho community. The evidence contradicts both assertions.

None of the appellants ever made or authorized a promise of a ready resale market. In fact, promises of a ready resale market were prohibited by AMREP and the individual appellants, and salesmen were fired upon discovery by AMREP of any such promises (A 3560, 3577, 3594). Howard Mandel, a witness for the prosecution and a former AMREP vice president of sales, testified that potential purchasers were never told that there was a ready resale market, or that they could make money overnight (A 1088). Lawrence Perlmutter, another witness for the prosecution and vice president and secretary of AMREP, testified that it was company policy to forbid any sales person from representing that people could make a quick profit on their land, or that there was a resale market (A 3581). Indeed, in a memo sent to Solomon Friend, Perlmutter stated that the phrases "this is a quick return on investments, we will resell your property at any time" were forbidden

statements. Perlmutter testified that this memo reflected company policy prior to January, 1971, the date of the memo (A 3584).

As for appellants' good faith as developers, the indictment's charge that appellants created a "false impression" that they were gradually developing all of Rio Rancho (A 14) was never proved at trial. The evidence showed that active development was continuing at the time of trial (A 3640-41) and there was no evidence that the acreage reserved in building units was insufficient to honor exchanges by all purchasers. The prosecution argument that defendants lacked the money to develop Rio Rancho fully was not supported by "anything in the record" as the trial court found (A 7952).

Related to the claim that appellants never intended more than a "showcase" development (A 191) is the assertion that defendants expected only 5% of land purchasers to move to Rio Rancho. There was no evidence that any defendant, except one who was acquitted, ever thought or said any such thing. Avellanet, author of a 1965 planning report, testified that in December, 1965 defendant Herman Oberman, who was dismissed from the case at the close of the prosecution's evidence, expressed the opinion that only 5% of the pur-

chasers would relocate (A 4820). This figure was adopted in Avellanet's report (A 10061). This single alleged remark by Oberman 11 years before the trial became the leitmotif of the prosecution's case: it was referred to again and again in the summation of counsel for the prosecution.

Other distortions of the record abound in the prosecution's brief. All of the following assertions are without support in the record, and many of them are flatly contradicted by it:

(a) That appellants represented that Rio Rancho Estates was the only available land into which Albuquerque could grow (PB* 5). There was no evidence to this effect.

(b) That Rio Rancho was subdivided in "gridiron" fashion (PB 6) as opposed to engineered to avoid arroyos and flood plains. There was no such evidence.

(c) That the target group of prospective purchasers was "primarily blue collar workers" (PB 9). In fact, most of the purchaser-witnesses called by the prosecution were well-to-do and educated; they included a dental surgeon, a certified public accountant, a chemical engineer, a real estate investor from New Jersey and a woman who had made \$50,000 the previous year on mortgage syndications. (See A 2306; 2262-64; 2268-69; 3781; 5317; 5799; 3895; 5870; 2639; 5477; 2946; 2571; 2587; 2950).

* References to PB are to the Brief for the United States of America.

(d) That the appellants "played an active role" in making the film West Side Story (PB 15). The evidence showed that one defendant received one memorandum about it (A 10514).

(e) That "many" purchasers did not understand the cancellation privilege. Only one witness testified that he did not understand it -- and the prosecution dishonestly cites his testimony "see, e.g. Jones, A 1864" (PB 18).

(f) That purchasers were led to believe that the defendants would provide utilities to each purchaser's lot in "the near future" (PB 27). There was no evidence to this effect.

(g) That purchasers were led to believe that they could exchange more than one lot for building one home (PB 30). Every purchaser-witness said he or she understood the even exchange right. (C-FB 4).

(h) That appellants "specifically edited-out" references to other developments in the film "West Side Story" (PB 15-16). In fact, the shorter version of the film specifically mentioned the five subdivisions other than Rio Rancho under development in the west mesa.

(i) That the resale disclaimer was "buried" in the New York property report, "concealed in fine print" or "generally unseen" by purchasers (PB 14, 64). It was, in fact, in the report's fifth paragraph in print of normal size (A 10807).

The above are only examples of the way in which the prosecution's brief deals with the facts. In light of this, we respectfully submit, the Court may not assume that the record says what the prosecution says it says.

Argument

We respond to the prosecution's arguments in the order in which they appear in the prosecution's brief.

I

THE EVIDENCE WAS INSUFFICIENT
TO SUPPORT THE VERDICT

The prosecution simply does not meet the issue on the sufficiency question.

As the trial court stated in its charge:

"The scheme to defraud in this case is alleged to have been that the defendants made a false claim as to the investment value of the purchase of land at Rio Rancho and made a false claim as to the direction and extent of growth of Albuquerque knowing the claims to be false." (A 7966)

Both as to investment value and as to the direction of growth, the prosecution wholly failed to show that either of the statements in question was false or that any appellant knew it to be false.

A. The Investment Theme

The main brief of appellants Carity and Daniel Friedman stated (C-FB* 30-31):

* References to C-FB are to the Brief for Appellants Chester Carity and Daniel Friedman, dated May 5, 1977. References to AB are to the Brief for Appellants AMREP Corp., Rio Rancho Estates, Inc., ATC Realty Corp., Howard W. Friedman, and Henry L. Hoffman, dated May 5, 1977.

"There was no evidence that the land was without value. There was no evidence that the value of the land had not appreciated. There was no material evidence of realized loss. There was no evidence of inevitable loss."

The prosecution offers nothing to refute these assertions. Instead, it distorts and reframes the issue which was presented to the jury, as follows (PB 59-60):

"This central sales representation rested on the assertion that there would be a brisk local resale market in Albuquerque that would be fueled by Albuquerque's predictable expansion to the northwest through Rio Rancho. While customers purchased lots in volume on the strength of this stark representation, the evidence at trial overwhelmingly demonstrated that the claim of a sound investment was false. In fact, no resale market existed in Albuquerque and those who misleadingly acquired Rio Rancho lots on the investment premise were stalking financial disaster."
(Emphasis added)

In short, the prosecution's brief assumes without proof that the representation of a good investment was equivalent to "the assertion that there would be a brisk local market in Albuquerque." There was no evidence whatever supporting the equation between the two. The only resale representation appeared in the 1965 Koniacki script, which was used for only four months.* Resale disclaimers appeared in New Jersey

* In its brief, the prosecution quotes from this ancient and short-lived script no fewer than 16 times. Yet, as we have noted, the Koniacki script was never connected to the appellants (C-FB 42-44).

property reports as early as 1965 and in New York property reports beginning in 1969. Not a single piece of evidence supports the claim that resale, brisk or otherwise, was promised by any one of the individual defendants or by any of the three corporate defendants. The evidence instead establishes that AMREP and the individual appellants prohibited any such representations and fired salesmen who made them.

There likewise was no evidence that "customers purchased lots in volume on the strength of this stark [brisk resale] representation." First, since 84% of the purchasers bought no more than two lots, and since less than 2% bought as many as five lots, there were hardly any "volume" purchasers. Second, of the twenty-four purchasers called by the prosecution, only one (Seder) testified to a promise of immediate resale, and that promise was by a salesman who had no authority to make such a promise. Since appellants never promised a resale market, the prosecution's recitation of evidence that purchasers were in fact unable to resell (PB 60-61) is beside the point and legally insufficient to support the verdict. United States v. Diogo, 320 F.2d 898 (2d Cir. 1963).

The prosecution argues that whether the statement that Rio Rancho land was a good investment implied a representation of quick resale was for the jury to decide (PB 62). But the jury was given no basis to find that "good investment"

meant "liquid investment" or "ready resale." The common meaning of "investment" implies a long-term benefit and indeed the trial court observed at trial: "All real estate is looked upon as illiquid...." (A 63). Nor did the State of New York find that "good investment" meant "ready resale." On the contrary, it permitted investment representations in the very same document in which it required a resale disclaimer (A10807).

If "good investment" meant, and was intended to mean, short-term liquidity, then the prosecution had the burden of proving just that. It did not do so, and its brief contains nothing to show that it did.

B. Direction of Growth

On the question of whether appellants committed fraud in stating that Albuquerque could only grow to the northwest, the prosecution simply fails to respond to the arguments which we previously made (C-FB 31-33, AB 41-56). We pointed out that opinions differed in the mid-1960's as to whether the projected growth in Albuquerque's population could be accommodated outside of the northwest triangle; that the prosecution's principal witnesses, Carruthers and Avellanet, admitted that their opinions on this question had been proved wrong, and that the northeast has now been substantially filled despite a much slower population growth than anyone -- including Carruthers and

Avellanet -- anticipated. We also pointed out that Albuquerque was and is certain to grow to the northwest, and that if defendants had said: "Albuquerque must grow to the Northwest" falsity could not even be claimed. We further pointed out that there was no evidence suggesting that appellants meant anything else when they said that Albuquerque could only grow to the northwest. It was demonstrated beyond doubt at trial that growth to the northwest necessarily implied growth to and through Rio Rancho (A 6552).

The prosecution does not dispute the assertions which we previously made, and it now concedes (though it vigorously disputed at trial) the key point that growth to the northwest was indeed a certainty: "All [witnesses] agreed that Albuquerque eventually would grow to the northwest, a fact not disputed by the government" (PB 42). The prosecution frankly rests its case, as we predicted, on its literal reading of the word "only" as meaning "without exception."* The prosecution claims that appellants do and did make the absurd assertion that Albuquerque would experience no growth at all in anywhere except the northwest region. In the absence of any evidence either that appellants meant this (United States v. Diogo, supra, 320 F.2d 898) or that any purchaser so understood them, appellants' conviction for having made such a representation cannot stand.

* The prosecution dramatizes its own literalism by italicizing the word "only" at page 53 of its brief.

C. The Good Faith of the Individual Appellants

Nothing in the prosecution's brief is flimsier than its attempt (PB 66-78) to cull from the record some evidence that the individual appellants acted in bad faith in making the two statements on which the prosecution's case is based. It is shocking, we submit, even to suggest that four men may be sent to jail on the basis of evidence like this.

We discuss the individual appellants in the order in which they appear in the indictment.

1. Howard Friedman

The prosecution has failed to point to any evidence justifying Howard Friedman's indictment, let alone his conviction.

The prosecution's record references do not support its assertion that "Howard Friedman was intimately involved in all aspects of the Rio Rancho sales effort." (PB 77). The claim that he "attended dinner parties" (PB 77) is grossly misleading. He attended a portion of one dinner party which was a testimonial for him (A 1487, A 1991, A 2377). What part, if any, of the sales presentation he heard, i.e., the content of the particular presentation, or the manner of the presentation, was never shown.

That Howard Friedman was interested in the success of mailings (A 791) and tours (A 1274-75), congratulated an employee for having done a good job (A 792), "at times" interviewed a prospective employee (A 815), was consulted on proposed changes in the Rio Rancho sales contract (A 10509), and visited a sales office (A 833) is not evidence of crime. The prosecution's reliance on such proof to justify Howard Friedman's conviction of federal felonies and the imposition of a jail sentence is tantamount to seeking to sustain his conviction on the ground that he lived and breathed and at the same time was an officer of the corporate defendants.

The evidence relied upon by the prosecution for its assertion that Howard Friedman "helped to construct marketing approaches" is vague and meaningless; we set forth that evidence below.* It plainly does not support a finding that Howard Friedman knowingly made false representations about Rio Rancho.

* At A 1035-36 (Mandel):

"Q. What were your responsibilities as vice-president for marketing?

A. To come up with various marketing concepts pertaining to the sale of Rio Rancho Estates.

Q. What AMREP officers if any did you report to or work with on these matters?

A. Chester Carity.

Q. Anyone else?

A. My immediate supervisor, Mr. Chester Carity.

(Cont'd. on next page)

The claim that Howard Friedman "was well-acquainted" (PB 77) with form letters sent to customers is not supported by any record reference, because no such evidence is in the record.

SEC statements signed by Howard Friedman which contained lawyer's language regarding the difficulty in immediately reselling Rio Rancho land show nothing, absent proof that it was Howard Friedman's intent to convey to customers a representation of immediate resale -- and the proof is absolutely and unequivocal.

(Cont'd from preceding page)

- Q. Did you work with anyone else?
A. I didn't work with anyone else per se. I am sure I spoke to people in various areas.
- Q. Which people?
A. Again, to the best of my recollection I am sure I discussed certain things with Howard Friedman, certain things with Dan Friedman."

And at A 3441 (Perlmutter)

- "Q. Who makes policy decisions on marketing?
A. On marketing would be Chester Carity.
- Q. Did you you from time to time have any conversations with Howard Friedman in connection with marketing ideas?
A. Occasionally."

The two memos cited by the prosecution (exhs. 468; 567, at A 10448 and A 10504) relate to an inquiry from Howard Friedman to his brother Daniel Friedman as to whether a telephone call is made to verify sales and a suggestion that when a field office is closed a tour program should be arranged so that personal contact with customers would not be lost.

cally to the contrary (see pp. 3-4 above). And the claim that Friedman "was responsible for the misleading use of price increases" is simply wrong. There was no misleading use of price increases. Customers were told of impending price increases and it is uncontradicted that all announced price increases occurred (A 3594). Moreover, proposed price increases had to be submitted for approval to the Department of State and were never implemented unless approved by that agency (A 3594-95).

With respect to the Harmon, O'Donnell & Henninger (Avellanet) report, there is no evidence that Howard Friedman received or ever read it; the mere existence of contrary opinion does not establish either falsity or knowledge of falsity. Moreover, the 1962 SEC filings which stated that the company did not know how Albuquerque's growth would affect Rio Rancho is irrelevant because no representation of northwest growth was made in 1962. (See pp. 17-18 below.)

Howard Friedman's conviction must be reversed.

2. Chester Carity

The prosecution relies primarily on the fact that Carity occupied a responsible executive position in the Rio Rancho sales program (PB 66-67). It concludes that Carity therefore "clearly knew and was responsible for the sales claims made on behalf of Rio Rancho" (PB 67) -- but if this

means all sales claims it is simply a non sequitur. Carity did not know and was not responsible for the occasional unauthorized acts of salesmen upon which the prosecution so heavily relies. The prosecution does not mention any sales claim of which Carity knew and approved that could justify an inference of bad faith.

The prosecution states that Carity knew a ready resale market did not exist. (PB 67) This is irrelevant: There is no evidence that Carity made or authorized any ready resale representations; as noted above, AMREP policy prohibited them (pp. 3-4). Since there was no such evidence, AMREP's acquisition of an additional 37,000 acres between 1969 and 1971 was not dishonest and is no evidence of fraud. Moreover, the purchase was fully disclosed. (See, e.g. Defense exhibits JX, CJ and BY).

The prosecution does suggest another argument based on this purchase: it states that Carity knew that the additional 37,000 acres cost only \$2 per acre more than the original 55,000 acres which had been purchased in 1961, and therefore knew that the value of Rio Rancho land was not increasing. The argument makes no sense: neither transaction can be compared to the purchase of Rio Rancho lots by AMREP's customers. Rio Rancho land was sold not as raw land, but with an exchange right into acreage serviced by water and utilities, which required a large capital investment. Its value per acre

bore no economic relationship to the value per acre of a block purchase of 7,000 acres of undeveloped land in which no capital investment had been made, and to which no exchange right attached. (See A 5014-5)

The prosecution states (PB 68) that Carity's knowledge of Avellanet's 1965 report establishes bad faith. In fact, it establishes only that Carity read the report, not that he agreed with its conclusions. Since Avellanet's recommendations were not followed, Carity and others apparently disagreed with him about the direction of Albuquerque's growth -- a disagreement for which there was substantial basis. (See C-FB 35-36.)

The prosecution states (PB 68) that Carity signed a 1962 SEC filing which was inconsistent with the representations of northwest growth. It fails to mention that the northwest growth representation was not made until 1965, three years after the SEC filing, and after publication of Yguado's monograph and the issuance of the film "West Side Story". The prosecution also quotes the SEC filing out of context, using only the last sentence of a paragraph which reads as follows (A 10403):

"The basis for the Company's interest in this property is that Albuquerque has experienced rapid growth in recent years; according to data published by the United States Bureau of the Census, its population has grown from 97,000 in 1950 to 201,000 in 1960, while the population of Metropolitan Albuquerque has grown from

146,000 to 262,000 during the same 10-year period. In recent years numerous homes have been erected between Albuquerque and the property. A large development of medium and higher priced homes presently is being erected in the area between the City and the property, and the northern line of such development adjoins the property on the south for approximately six miles. The Company does not, of course, know what growth, if any, Albuquerque will experience in the future, or if any such growth will benefit the Company."

The prosecution claims that "Carity understood that AMREP never intended to develop fully the 91,000 acres of Rio Rancho Estates" (PB 69). It supports this assertion by pointing to Carity's review of Avellanet's report which purportedly "recounted defendants' belief that only 5% of the people who bought land eventually were expected to move to Rio Rancho" (PB 69). This is a gross distortion: Avellanet did not quote his purported conversation with Oberman, upon which the prosecution relies so heavily (see pp. 4-5 above), but expressed his view of the percentage of purchasers who actually would move as based upon general land sales industry experience. Thus Avellanet did not recount "defendants' belief," and his expression of his own opinion is no evidence that Carity did not intend full development.

Finally, the prosecution points to Carity's handwritten notations on a memorandum. But the notations are those of an honest, careful businessman. The memorandum had to do with the

first publication of the Rio Rancho newspaper entitled "Roadrunner," and Carity commented that the company should not use the word "commitments" since this useage would require a fulfillment. Carity actually was evidencing his good faith: he knew that any commitment which was made had to be honored and he also knew that a successful developer required flexibility. That his comments were perfectly innocent is confirmed by Carity's typewritten memorandum with regard to the newspaper, which the prosecution does not quote (A 10455):

"I would certainly not go into any commitments or plans of Rio Rancho in the future except perhaps minor ones that have already been committed or that are already in progress. We must remember that anything ever printed in this paper as future plans must then be carried through, even though we may come up with what we consider a better alternative. The residents will always be trying to pin us down on one thing or another which may interest them in particular, but we must always be free to adjust our planning as we go along." (Emphasis added in part)

The evidence was insufficient to establish bad faith on Carity's part. Indeed, the evidence establishes just the opposite.

3. Henry L. Hoffman

The prosecution relies on the vague characterization of vague evidence to conceal the fact that there is no evidence whatever connecting Hoffman to any of the conduct

of which the prosecution complains.

The claim that Hoffman was "involved in writing" advertising material and dinner party scripts (PB 75) is not supported by any evidence as to which particular advertising pieces or scripts he wrote (of the countless thousands utilized over the history of the company), when he wrote them, when, indeed if ever, they were used, or where they were used. So-called evidence of Hoffman's "help" in "produc[ing]" (id.) two promotional films is equally meaningless, for the evidence does not disclose what, if anything, Hoffman did. In particular, the prosecution's reliance on "the edited version of 'West Side Story'" (id.) is misleading -- first, because there is no evidence that Hoffman knew about or ever saw the so-called edited version or that he participated in or condoned the editing that took place,* and second, because the editing is amply justified by the fact that appellants were in business to sell Rio Rancho land, not someone else's development. Moreover, even the shorter version mentions all five of the west side developments other than Rio Rancho.**

* Indeed, there is no evidence that the unedited version was not played at dinner parties. It was proven that a film entitled "West Side Story" was played at parties, but the record is absolutely barren as to which of the two versions was utilized.

** Throughout the prosecution's brief reference is made to alleged dishonest editing of the "West Side Story" film. In view of this, we invite this Court to view the various versions. We respectfully suggest that any dishonesty is in the prosecution's argument, not in the editing.

The prosecution's reliance on Mandel's testimony that Hoffman "went to some sales dinners" (A 834) again proves nothing with respect to Hoffman's knowledge that anything said at those dinners was false. And the claim that Hoffman discussed many aspects of the sales presentation with other officers is belied by the very record references relied upon by the prosecution (PB 75).

At A 794:

"Q. How frequently did you speak with Mr. Henry Hoffman?

A. Not that frequent. When we started to expand into different brokers and all, I spoke to him about different advertising pieces that might be helpful and he asked me how everything was going, if I had any suggestions, if there was anything that the sales offices needed as far as aids."

At A 821:

"Q. What would your conversations with Henry Hoffman be?

A. Pertaining to some piece of advertising that I felt we might need.

"Q. What would the nature of those conversations be?

A. If we could get any reprints for that specific area from certain newspapers if there was anything available."

At A 835-36:

"Q. But when you had these conversations with the gentlemen you just mentioned about visits to sales offices, did they include discussions about sales dinners they attended?

* * * *

Howard Friedman

Did the conversations include talk about sales dinners that he attended?

A. He told me his feelings if he felt it was a nicely run dinner or not.

"Q. Did the conversations with Mr. Hoffman include that,

A. I am sure it did, yes."

And at A 1182:

"Q. Do you recall any other such conversation with any other officer?

A. There was a discussion regarding the film and an attendance in a party with Hank but I don't know that he even saw the whole dinner party. I think he attended and I think it related to the film.

Q. Hank referring to who?

A. Hank Hoffman."

The SEC filings (exhs. 402, 410) relied upon by the prosecution (PB 75) to prove Hoffman's knowledge that resale was presently difficult are not at all probative of whether Hoffman knew or believed Rio Rancho land was a good investment. There was no proof that Hoffman or any other appellant ever authorized a representation of instant liquidity; in fact, the proof was contrary (see p. 3 above). Moreover, while the 37,000-acre purchase was also irrelevant, as noted above, the record reference (A 1199) cited in support of the prosecution's claim that Hoffman "participated in negotiations for" this purchase (PB 75) proves the claim false:

"Q. Did you have discussions with any other corporate officers on that topic [i.e., negotiations with respect to the additional acquisition of real estate]?

A. I think in a passing way I would have mentioned something like that to Hank Hoffman and certainly to Dan Friedman and to Chester Carity, I would have made more than just a casual remark about it. We would have just discussed that we were having problems getting office allocations.

Q. What was Hank Hoffman's position in the company at that time?

A. I don't really recall his title. Ultimately I heard once that he was senior vice president, but I don't know what his title was during that span of time."

The claim that Hoffman knew that Albuquerque's growth would not have any beneficial impact on Rio Rancho is supported only by the 1962 SEC filing which stated that AMREP did not know the direction of Albuquerque's future growth. As noted above, however, the proof establishes that no claim regarding Albuquerque's growth was made in 1962 which was contrary to the SEC statement. Representations about Albuquerque's growth began in 1965, and were supported by Yguado's 1963 "Growth and Development Study" (Exh. EK--A10875). By then, AMREP had removed the 1962 statement from its SEC filings.

The evidence cited to support the prosecution claim that Hoffman "received and reviewed the Harmon, O'Donnell & Henninger [Avellanet] report" (PB 76) is a memorandum from Carity to Hoffman and four others setting forth Carity's critique of the report and Carity's suggestions for development at Rio Rancho (A 10968-10970). There is no proof that Hoffman "received and reviewed" the report itself. A fortiori,

there is no proof that Hoffman agreed with Avellanet's opinions, or knew that all contrary opinions were false. As Judge Metzner stated at trial:

"The mere fact that there are reports in existence which would support the government's position does not mean it is true and that the opposite said by the defendants is a false statement.

"There are opinions voiced by other people upon which the government relies to have this jury draw the conclusion that those statements are true, but the mere fact that somebody said them does not make them true." (A 7474)

In sum, there is no evidence to support Hoffman's conviction.

4. Daniel Friedman

The prosecution states that Daniel Friedman joined AMREP in 1963 as assistant controller, and became vice president of sales in 1971 (PB 69). It does not state, however, that Friedman, before he became vice president of sales, was not responsible for the substance of the "set format which had to be followed" in selling Rio Rancho land (PB 8), but instead was concerned with monitoring the costs of sales with regard to such things as new office furniture, the selection of middle-priced restaurants, and other miscellaneous items of expense.

Because Daniel Friedman did attend some sales dinners, it is conceded that he knew of the authorized statements which were made at those dinners. But, despite the implication which the prosecution suggests by its recitation of his duties (PB 70), there was no evidence that Friedman knew unauthorized statements were being made.

The prosecution states that a "rider" used for customers overseas established bad faith on Daniel Friedman's part. This advised certain overseas customers that a ready resale market did not exist. Friedman's knowledge of this rider does not establish bad faith on his part. Representations of a ready resale market were not authorized in the United States, were disclaimed in various property reports, and were prohibited as a matter of AMREP corporate policy. Significantly, the prosecution does not even claim that Daniel Friedman ever made or authorized any representation of a ready resale market. If there were such evidence, then surely it would be presented.

The main thrust of the prosecution's argument is that Daniel Friedman supported an atmosphere of urgency as conducive to sales, and that he believed also that pre-announced price increases, which were truthful, provided a useful selling tool. In a statement which, if accepted, would probably establish criminality on the part of every American salesman, the prosecution says (PB 72):

"Friedman's report to mass psychology and a contrived atmosphere of urgency was one of several factors that pointed up the lack of his own good faith belief in the soundness and security of a Rio Rancho investment."

The prosecution states that Daniel Friedman knew the company was not in a position to completely develop Rio Rancho because of insufficient reserve acreage, and that it would take almost 200 years to fully develop Rio Rancho in any event. For reasons already stated (see p. 4 above) there was no evidence to support the argument that Rio Rancho could not be fully developed, much less that any defendant believed that Rio Rancho could not be fully developed.

There was also no evidence to support the claim that Daniel Friedman, or any defendant, believed it would take almost 200 years to fully develop Rio Rancho. This prosecution conclusion is based upon a single document (GX 963, A 10677), which the trial court itself ruled could not be used as evidence of any future projection (A 5613). In fact, Rio Rancho presently, even after conviction, is building homes in numbers substantially greater than the "350 to 400 homes per year" referred to in the exhibit in question.

The prosecution virtually concedes that there was no evidence to support a determination of Daniel Friedman's bad faith in connection with the statement of northwest growth. It does argue that Friedman must have known of

Carruthers' 1964 Land Use Plan. There was no evidence that Daniel Friedman, or any individual defendant, read or even knew of the Carruthers' document, and there is no basis for the inference which the prosecution suggests. Moreover, as we have noted, even knowledge of Carruthers' document would not establish bad faith, since there was abundant competent contrary opinion as to Albuquerque's future.

The prosecution concedes that Daniel Friedman had no knowledge of Avellanet's report, which is the only other evidence upon which its claim of bad faith in connection with the northwest projection is based.

In essence, the prosecution's claim of guilty consciousness and bad faith on Daniel Friedman's part comes down to an argument that Daniel Friedman is guilty because he was there. No concept of criminal law of which we are aware justifies such a determination.

II

IF EITHER THEORY OF FALSITY WAS
INSUFFICIENTLY PROVED, A NEW TRIAL
IS REQUIRED

We have previously argued (AB 62-63) that, while both the prosecution's theories of falsity were insufficiently proved, insufficient proof on either theory would require a new trial, for both theories were submitted as alternatives to the jury and the jury may well have convicted on the theory insufficiently proved. The trial court charged:

"If you do not find beyond a reasonable doubt that a scheme existed to defraud purchasers of land at Rio Rancho, which included either a false claim as to the investment value of the purchase or a false claim as to the direction and extent of the growth of Albuquerque, you must acquit the defendants."
(emphasis added)

Simple common sense and fairness require a reversal if either of the two alternatives stated by the court was wrongly submitted to the jury. In support of this proposition, we have cited Yates v. United States, 354 U.S. 298, 311-312 (1957); Stromberg v. California, 283 U.S. 359, 367-368 (1931); and United States v. Natelli, 527 F.2d 311, 325 (2d Cir. 1975), cert. denied 425 U.S. 934 (1976).

The prosecution seeks to avoid the Yates-Stromberg-Natelli rule by arguing that: (1) the claim was not preserved at trial; (2) the rule does not apply to cases involving conspiracies or schemes to defraud; and (3) the rule applies

only where an incorrect legal theory is submitted to the jury. The prosecution's arguments should be rejected.*

A. The Prosecution's Failure of Proof on Each One of Its Alternative Theories of Guilt Was Preserved for Appeal

In finding that appellate review of the trial court's ruling permitted the jury to convict in United States v. Natelli, supra, on a specification of falsity insufficiently proved as a matter of law had been properly preserved, Judge Gurfein of this Court wrote:

"... appellate review is not generally available when the particular insufficiency has not in some way been called to the attention of the trial judge." (Id., 527 F.2d, at 329). (Emphasis supplied.)

In the case at bar, appellants argued on at least three occasions -- after the prosecution case (A 6033-80); after the whole case (A 7391-7420) and in a motion after the verdict (A 8359-62) -- that the evidence on each specification of

* It bears mention that the prosecution's argument that Natelli has no application to this case is the only argument made by the prosecution which does not deprecate appellants' appeal points with such flip cliches as: "borders on the frivolous" (PB 44); "simply astounding" (PB 58); "simply preposterous" (PB 69); "startling" (PB 90); "specious" (PB 98); "without merit" (PB 117); "wholly without merit" (PB 126); "without merit" (PB 126); "not withstand analysis" (PB 130); "last ditch effort to upset their richly merited conviction" (PB 136); "frivolous" (PB 141); "totally unjustified" (PB 151); "frivolous" (PB 151).

falsity independently was insufficient. These motions, made after the prosecution case and after trial, were supported by briefs which included the following point headings:

1. "The Prosecution Has Failed to Introduce Sufficient Evidence from which a Reasonable Juror could Conclude Beyond a Reasonable Doubt the Falsity of the Claimed Representation that Rio Rancho Land Was a Good Investment." (Brief in support of motion for judgment of acquittal, Dec. 28, 1976, p. 8.)

2. "The Prosecution Has Failed to Prove that Albuquerque is Not Predestined to Grow to the Northwest, The Evidence In Fact Is To the Contrary" (id., p. 14).

3. "Defendants were Justified, in their Opinion that Albuquerque's Future Growth Could Only Occur to the Northwest and in any Event the Prosecution Failed to Prove that the Defendants Did Not Honestly Believe in the Accuracy of their Opinion" (memorandum of law in Support of Defendant's Post Trial Motions, March 4, 1977, p. 5).

4. "Defendants Were Justified in Their Opinion that the Purchase of Lots in Rio Rancho was a Good Investment and In Any Event the Prosecution Failed to Prove that the Defendants Did Not Honestly Believe in Their Opinion" (id., p. 17)

It can thus hardly be disputed that appellants called the trial judge's attention "in some way" to the contention that the evidence was insufficient to each specification, and this is all that Natelli requires.

The prosecution's claim that the Natelli court found the error in that case preserved only because the defendants

there "unsuccessfully sought an instruction that the jury had to be unanimous on the particular specification found to be false before a conviction could be rendered. . ." (PB 80), is belied by the Natelli opinions. The original opinion did refer (527 F.2d at 324-25) to the defendants' requests on unanimity, but it unambiguously rested its holding on the impossibility of telling whether the jury convicted on the sufficient or the insufficient specification. (See the language quoted at AB 63). Following the prosecution's petition for rehearing, which resulted in the withdrawal of this Court's reversal of Scansaroli's conviction on the finding that the appeal point was not properly preserved (527 F.2d, at 327), this Court reversed itself again on Scansaroli's petition for rehearing and specifically held that the point had been properly preserved by "call[ing] to the attention of the trial judge" the "particular insufficiency" (id., at 329). Thus, the Natelli court's final opinion was the definitive one on whether the error was properly preserved; nowhere in that opinion does the Court rely on the request for a unanimous verdict with respect to each specification. Moreover, if Natelli could be read as requiring a request for a charge that the jury must acquit or convict independently on each specification of falsity, such requests were made. (A 8247, A 7474; A 8255, A 7479).

Finally, the prosecution's claim that "at no time . . . in the arguments on the Rule 29 motions . . . did defendants even cite Natelli to the District Court" (PB 80) is both irrelevant and wrong. Since Natelli relates primarily to what an appellate court should do once error has been found, we had no reason to stress it in our arguments below. Moreover, the prosecution's brash claim -- typical of its treatment of the record -- that "at no time. . . in the arguments on the Rule 29 motions. . . did defendants even cite Natelli to the District Court" (PB 80) is a flat misstatement (see A 6250). The following was said in support of defendants' motion for a judgment of acquittal made at the close of the prosecution's case:

"Assuming, as your Honor has found, that there is sufficient [evidence] to hold him in the case, perhaps on allegations prima facie, at least, Mr. Daniel Friedman is in the position of facing conviction on a theory or possibility of a theory of falsity to which he is not connected, a matter which was discussed in the case of United States against Natelli." (A 6250).

B. Natelli Does Apply to Cases Charging
A Conspiracy or Scheme to Defraud

In arguing that "Natelli does not apply to the sufficiency of a particular means of a fraudulent scheme, comprised of several members" (PB 81), the prosecution appears to mean only that, where a specification of falsity

is insufficiently proved as to a particular co-conspirator, that person's conviction may be upheld because the acts of his co-conspirators are attributed to him. This argument misses our point: we contend that each specification of falsity was insufficient to support a claim of fraud by any of the appellants or their alleged co-schemers. We claim, in short, that in the circumstances of this case to say that "Rio Rancho land is a good investment" or "Albuquerque can only grow to the northwest" was not a crime. If we are right in either of these contentions, then one specification was submitted to the jury which was insufficient as to all appellants. In these circumstances, there is no reason to distinguish a conspiracy case from one involving substantive offenses.

Moreover, even if one of the specifications were insufficient only as to one, two or three appellants (as the prosecution virtually concedes, Daniel Friedman was never connected in any way to the representation of Northwest growth) those appellants would be entitled to a new trial under Natelli. Daniel Friedman, at least, never entered into any scheme to deceive purchasers as to the direction of growth of Albuquerque; since he never formed any intention to do this, the alleged acts of others in furtherance of such intention cannot be imputed to him. It is only acts of co-

conspirators, not their intentions, which can be imputed to others under the rule on which the prosecution relies.

United States v. Feola, 420 U.S. 671, 686 (1974); United States v. Tavoularis, 515 F.2d 1070, 1074 (2d Cir. 1975). Therefore, it was error to permit the jury to convict Daniel Friedman based on the "northwest growth" representation, and that error entitles him to a new trial.

In short, the fact that this case involved an alleged "scheme" of "several members" furnishes no ground for distinguishing Natelli. In any event, this case was tried and charged to the jury as a false statement case. Judge Metzner instructed the jury as follows:

"The scheme to defraud in this case is alleged to have been that the defendants made a false claim as to the investment value of the purchase of land at Rio Rancho and made a false claim as to the direction and extent of growth of Albuquerque knowing the claims to be false."

* * *

"If you do not find beyond a reasonable doubt that a scheme existed to defraud purchasers of land at Rio Rancho, which included either a false claim as to the investment value of the purchase or a false claim as to the direction and extent of the growth of Albuquerque, you must acquit the defendants." (A 7971, A 7975). (Emphasis added.)

C. Natelli Applies in this Case Where
the Jury May Have Convicted on an
Insufficiently Proved Specification

The prosecution urges that Natelli should be limited to cases where "a jury has rendered a general verdict on a count presented to it on an erroneous or flawed legal instruction" (PB 85), and should not apply where a general verdict may be based upon a factual theory insufficiently proved as a matter of law. Once again, the prosecution's theory is inconsistent with Natelli itself.

In the original reversal of Scansaroli's conviction, Judge Gurfein made it crystal clear that a new trial was required because the case was submitted to the jury on a legally insufficient factual theory:

"A difficulty does arise, however, if it is found as a matter of law that there should have been a directed verdict for a defendant on one of the specifications for insufficiency of evidence. The verdict then becomes ambiguous. for the jury could have rejected the specification which the appellate court holds sufficiently proved, and have convicted only on the specification held to be insufficiently proved. In that event, there seems to be no alternative to remand for a new trial." Id., 527 F.2d, at 325.

And again, on Scansaroli's petition for rehearing, this Court wrote:

". . . Yates v. United States, [citation omitted], and Stromberg v. California, [citation omitted], can be read as covering the situation where a jury may have convicted on the very specification which is insufficiently proved to make out an offense." (Id., 328).

See also, United States v. Jacobs, 475 F.2d 270 (2d Cir.), cert. denied 414 U.S. 831 (1973).

As the Natelli court recognized, the distinction drawn by the prosecution is a false one. It is axiomatic that a case presented to a jury upon a factual theory insufficiently proved as a matter of law is submitted to the jury "on an erroneous or flawed" legal theory as well.

In an attempt to avoid this clear reading of Natelli, the prosecution (PB 82) cites many cases (e.g., United States v. Mack, 112 F.2d 290 (2d Cir. 1940)), which, it says, hold that a conviction will not be reversed where one of a number of alternative factual theories was submitted to the jury without sufficient proof. However, Mack, and most of the other cases cited by the prosecution, do not directly address the problem presented when, from all that appears, a jury may have convicted on an insufficiently proved specification. Mack and its progeny concern the district problem of a variance between the indictment and the proof at trial; they hold that the prosecution is not required to prove every alternative factual theory stated in the indictment. That is not the issue here. Here, the jury was specifically told it might convict on the basis of either one or the other specification. (See p. 29 above).

We do not contend that there is complete harmony among the Second Circuit cases on this issue. The modern

trend, however, is consistent with Natelli, in reflecting an unwillingness to affirm convictions where an insufficiently proven specification was submitted to the jury, absent indication from the jury verdict itself or the elements of the offense that the conviction was not based upon an insufficiently proved or otherwise improper theory of guilt.*

In United States v. Dixon, 536 F.2d 1388 (2d Cir. 1976), the defendant was convicted of violating the SEC proxy and reporting statutes, and the mail fraud statute and conspiring to violate both of those statutes. This Court directed a dismissal of the substantive mail fraud counts because the prosecution's proof on those counts was insufficient. The conspiracy conviction was challenged upon the ground that the evidence was insufficient to sustain that charge insofar as it alleged a conspiracy to commit mail fraud. This Court upheld the conspiracy conviction but painstakingly pointed out that the jury's guilty verdict on the substantive SEC counts was an ample indication that the guilty verdict on the conspiracy count was based at least upon a finding

* Other Circuits have directly applied the Stromberg-Yates-Natelli type analysis to conspiracy cases reversing conspiracy convictions if a conviction on any one of several object crimes would have been an impermissible verdict. See, e.g., United States v. Baranski, 484 F.2d 556, 559-561 (7th Cir. 1973); United States v. Driscoll, 449 F.2d 894, 898 (1st Cir. 1971), cert. denied, 405 U.S. 920 (1972).

of a conspiracy to commit the sufficiently proved SEC violation. Judge Friendly wrote as follows:

" . . . here we know from the conviction on Count II [the SEC substantive count] that the jury found that Dixon had committed the offense validly charged in the conspiracy count." Id., 536 F.2d, at 1402.

Similarly, in United States v. Jacobs, supra, 475 F.2d 270, a conviction on a conspiracy count alleged in two theories -- a conspiracy to cause stolen treasury bills to move in interstate commerce and a conspiracy to defraud the United States by causing the bills to be presented for payment, knowing them to have been stolen -- was upheld by this Court despite a ruling that the prosecution's case on the interstate commerce theory was insufficient. The Court recognized the general rule that when a jury is given two factual theories upon which it could base a guilty verdict, the judgment must be reversed where one of those theories is an impermissible one. However, the case was found to fall outside of that general rule because the elements of the two theories were such that even had the jury convicted on the impermissible theory it would have by necessity found all the elements required for a conviction on the permissible theory. Judge Friendly wrote:

"If the jury found a conspiracy on what we deem the erroneous view. . . it would have found every element necessary to support a conclusion that the defendants had entered into an agreement to [commit the offense validly charged]. . . . Whether the jury found [the defendants] guilty on the first theory submitted to it, or on the second, or on both, there is thus no uncertainty that the jury found every fact necessary for a valid conviction. . . . (Emphasis supplied.) Id., 475 F.2d, at 283-84.

In the instant case, there is nothing either from the verdict itself (as in Dixon) or the elements of the two specifications of falsity (as in Jacobs) from which this Court could properly conclude that there was "no uncertainty" that the fraud convictions were based upon a permissible theory of guilt. As in Yates, supra, "it is impossible to tell which ground the jury selected" (354 U.S., at 312).

WVWV

The first of the two main parts of the work is the history of the movement. This is a very interesting and well-written account of the development of the movement from its beginnings in the 18th century to the present day. The second part of the work is a collection of essays on various aspects of the movement. These essays are written by leading experts in the field and provide a comprehensive overview of the current state of research on the movement. The book is well-illustrated with many photographs and diagrams, and is written in a clear and accessible style. It is a valuable resource for anyone interested in the history and development of the movement.

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any subdivided lands offered for sale" (Real Property Law, § 338.8). Clearly, the state does not approve the purchase; it does not tell anyone to purchase or not to purchase land. It does approve -- or, at least, could reasonably be believed to approve -- the advertising used, as non-fraudulent. The prosecution uses italics (PB 92-93, fn.3) in quoting the statutes in order to obscure this distinction, and to suggest that the statutes and regulations prohibit the representation that the Department of State approved "advertising." But the unmistakable meaning of these statutes and regulations² is

² The full text of the statutes and regulations cited by the prosecution are as follows:

New York Real Property Law, § 338.8 provides:

"Any person, partnership, corporation, company or association representing in any manner that the state, the Department of State, or any officer thereof has recommended or acquiesced in the recommendation of the purchase of any subdivided lands offered for sale or lease, in advertising or offering such subdivided lands for sale or lease, shall be guilty of a misdemeanor punishable by a fine of not more than one thousand dollars, or imprisonment for not more than one year or by both such fine and imprisonment."

And 19 N.Y.C.B.C. § 135.13(b) provides:

"No subdivider or his or its agent or agents or employees shall directly or indirectly, advertise, represent or make any claim, oral or written, that the State of New York or the Department of State or the Division of Licenses, or any employee, agent or representative of the State of New York or the said Department, or Division, has approved or recommended or acquiesced in the approval or recommendation

(footnote continued)

to prohibit representations orally, in writing "in advertising" or in "offering subdivided lands for sale" that the Department recommends "the purchase" of subdivided lands. There is no prohibition on representing that advertising has been submitted, reviewed and approved.

Calling appellants' analysis of these statutes and regulations "a misleading play on words" (PB 94), the prosecution argues that "if the state was passing on the 'bona fide' of the representations [in filed advertising] then, by definition, it would be giving the filing its 'approval' and passing on its 'merits,' which is precisely what the Real Property Law . . . indicates the State cannot do" (PB 94). Again, the Real Property Law does not prohibit the State from passing on the merits of the "filing" -- indeed, it compels the State to do so. What is prohibited is the State's passing "upon the merits of the offering" (emphasis supplied) (Real Property Law, § 337b-5), to wit, approving or recommending the purchase. In simple parlance it is impermissible to say that the state recommends purchase; it is permissible to say that

(Footnote cont'd from preceding page)

of the purchase of any subdivided lands offered for sale or in advertising or offering subdivided lands for sale. (Subdivision 8 of section 338 constitutes violation of misdemeanor punishable by fine of not more than \$1,000, or imprisonment for not more than one year, or by both such fine and imprisonment.)"

the state has given its seal of approval to the manner or content of the offering representations.

Nor is it anomalous, as suggested by the prosecution, that the state statutes punish the making of false representations in advertising notwithstanding the filing of advertisements (PB 94, fn.). If appellants had concealed or misrepresented facts in their filings with the Department of State -- a contention made by the prosecution in its opening but never proved or even attempted to be proved at trial -- or if appellants had made representations aside from those submitted for review -- as the evidence proved that they did not -- then the state penal statutes would apply. They do not apply to the present facts.

Finally, the prosecution suggests (PB 94-97) that there was insufficient evidence to warrant instructions and permit argument on the defense of appellants' belief in state approval. Appellants proved that they submitted their advertising for state approval; and that they did not use material which had not been approved. (See, e.g., A 3556-58) Six prosecution witnesses who were officials of the corporate appellant AMREP testified that it was their understanding and belief that all company advertising used in New York was submitted before use to the New York Department of State for its review and approval (A 828, A 1080-83, A 1294-95, A 1494-96, A 2042-43, A 2396, A 3556-65, A 3590-95,

A 1494-96, A 2042-43, A 2396, A 3556-65, A 3590-95). All advertising used in New York State was endorsed with a so-called "NYA number" assigned by the Department of State to the advertising after its review and approval (see, e.g., A 3556-58).

It is certainly a fair if not compelling inference that the individual appellants -- all of whom are charged by the prosecution with either creating, writing or being familiar with AMREP's advertising -- knew that advertising used in New York had to be submitted to the Department of State and believed that the Department assigned its "NYA number" after approval. Indeed, the whole prosecution theory of the individual appellant's knowledge and thus criminal liability was based on the assumption that the individuals were responsible for the acts of their employees and chargeable with their knowledge and intent (see, e.g., PB 73, 112-13). So too, the prosecution urged that if corporate agents and employees knew that sales claims were false, the individual defendants must have known also. This theory, which runs throughout the prosecution presentation, is made explicit in a footnote in the prosecution's brief (PB 113, fn.):

"It is not unreasonable . . . to infer in light of all the evidence in the record that if Rio Rancho's engineering consultant and an assistant vice-president knew about Albuquerque's direction of growth, so did the individual defendants." (Emphasis added.)

In the same vein, it is at least as reasonable to infer that if several sales managers and several vice-presidents knew and believed that advertising had to be submitted and approved prior to use, so did the individual appellants.

The prosecution's claim that appellants were not entitled to instructions or argument on the defense because the evidence of what these employees knew and believed with respect to State review and approval was "conflicting" (PB 95) ignores the fundamental rule in this Circuit that a defendant is entitled to jury instructions on any defense theory for which there is "any foundation in the evidence, no matter how weak or incredible that evidence may be" (United States v. O'Connor, 237 F. 2d 466, 474, n. 8 (2d Cir. 1956)) when viewed in the light most favorable to the defendant (United States v. Licursi, 525 F. 2d 1164, 1168-69 (2d Cir. 1975)).

IV

PREJUDICIAL EVIDENCE WAS ERRO-
NEOUSLY ADMITTED AT THE TRIAL

The prosecution fails to justify the trial court's erroneous rulings on the admission of evidence.

A. The Tape Recordings

The prosecution's blind reliance on Rule 901(a) of the Federal Rules of Evidence to justify the admission of the purported sales meeting tape (Exh. 669A) and the purported dinner presentation tape (Exhs. 671 A and B) is misplaced. The fact remains that neither Mandel nor Zacknich testified to any circumstance from which it could be inferred that the two tape recordings in question were in fact of a sales meeting or a dinner presentation. This is especially true with respect to exhibit 669A since there was absolutely no evidence as to a custom or practice followed in sales meetings. Mandel's and Zacknich's generalizations as to other tapes, so completely relied on by the prosecution, have no bearing on the authenticity of the tapes in question.

Moreover, the elements of authentication mandated by the court in United States v. McKeever, 169 F. Supp. 426 (S.D.N.Y. 1958), must be read as the quantum of evidence required to establish under Rule 901(a) of the Federal Rules

of Evidence that tape recordings offered into evidence are true and accurate recordings of what their proponent claims. In his treatise on evidence, Judge Weinstein discusses Rule 901(a) as it relates to the authentication of tape recordings, sets forth Judge Herlands' seven conditions for authentication as stated in United States v. McKeever, supra, and concludes that even under Rule 901(a):

"The court should refuse to admit a recording into evidence if speaker identification or any of the other elements of authentication [as set forth in McKeever] are lacking."
(Weinstein, Evidence, ¶901(b)(5)[02], p. 901-70).

Here every one of the "elements of authentication are lacking" and the court should have refused to admit the tapes into evidence.*

The prosecution does not deny that the testimony of Mandel and Zacknich failed to establish a continuous chain of custody for the tapes (PB 100). Rather, citing United States v. Steinberg, 551 F.2d 510, 515 (2d Cir. 1977), in support of its proposition, the prosecution suggests that

* The suggestion (PB 101) that the tape recordings are authentic as business records is ridiculous. Even if they are business records -- and the evidence is plain that they are not -- the business record exception is only an exception to the hearsay rule. Even business records must be authenticated before they are admissible.

no chain of custody is required as "a prerequisite to the admissibility of tape recordings" (id.).^{*} Steinberg, however, is inapposite because in that case the recordings were admitted following the testimony of the one who actually made the recording and who was a participant in the recorded conversation. There was thus no need to establish a chain of custody since a witness was able to establish that the recording accurately reflected the conversation that occurred. As Judge Lumbard said in Steinberg immediately following the quotation referred to by the prosecution:

"... the testimony of Volpe as to the authenticity and accuracy of the tapes laid a sufficient foundation for their admission."

Here, proof of a chain of custody was crucial because this case, unlike Steinberg, involves a total lack of

* The prosecution's representation that "no objection similar to the one now raised was raised below" (PB 101, fn.) is belied by the record at A897, where with respect to exhibits 671 A and B one of the specific objections stated was "chain of custody"; the voir dire examination and colloquy at A 1218-28 establish that the objection to exh. 669A was also the failure to establish a chain of custody.

Moreover, prior to trial, appellants specifically reserved objections as to authenticity with respect to these tape recordings as well as other proposed prosecution exhibits (see, memorandum of objections to the government's proposed exhibits, Oct. 8, 1976, p. 10; and defendants' memorandum on the subject of authenticity of documents proffered by the government, Oct. 30, 1976, p. 3).

evidence as to the "authenticity and accuracy of the tapes." Thus, the prosecution's sub silentio argument that the tape recordings were "self-authenticating" is baseless and simply wrong.

B. The Letters by Albuquerque Realtors

The prosecution now concedes that the five letters from Albuquerque realtors (Exhs. 129a, 129e, 129h, 129j, and 130a), introduced to prove that there was no resale market for Rio Rancho land in Albuquerque, were erroneously admitted into evidence without compliance by the prosecution with the Federal Rules of Evidence (PB 105, fn.). In claiming that the error is harmless, the prosecution seeks to downplay the significance of the letters. The prosecution was not so diffident during its summations at trial where the letters were referred to over and over again (see, e.g., A 7559, A 7579, A 7910). Indeed, one letter, exhibit 129a, was read once in its entirety during the prosecution's initial summation (A 7579) and quoted from in its rebuttal summation (A 7910).

The prosecution claims that the prejudice which resulted from the inability to cross-examine these letters must not be viewed seriously because "the defendants had sufficient time . . . [when] defense counsel . . . traveled to Albuquerque . . . to have confronted these realtors with

their past assertions . . ." (PB 105, fn.). This argument misses the point of appellants' right to confrontation, as recent authority demonstrates. In United States v. Oates, _____ F.2d _____, slip op. 6389, 6461-62 n. 39 (2d Cir. June 3, 1977), this Court recognized that the vice in the prosecution's failure to call an available witness to testify, while introducing the witness' statement, is to "shield . . . the witness' testimony from cross-examination. . . ." In language especially relevant here, Judge Waterman wrote:

" . . . the disadvantage the defendant suffers because of the prosecutor's failure to call the extra-judicial declarant is not ameliorated by the defendant's ability to call the extra-judicial declarant as his own witness."
(Citations omitted.)

In sum, the letters, concededly admitted erroneously, were prejudicial and were heavily relied upon by the prosecution, and thus warrant reversal of the convictions.

C. Hearsay Statements of Corporate Employees

We have already demonstrated (AB 73-81) that prejudicial statements of corporate employees were erroneously admitted in evidence. We rely upon our previous discussion here; the prosecution's brief does not, we submit, justify admission of this evidence.

V

THE APPELLANTS WERE IMPROPERLY
CONVICTED FOR ISOLATED IDIOSYN-
CRATIC CONDUCT

We have previously argued (C-PB 40-45) that the appellants were irretrievably prejudiced by a flood of evidence of isolated and idiosyncratic conduct for which the defendants were not responsible. We said that the prosecution, for its own purpose, took the position that the Rio Rancho sales program was subject to the appellants' rigid control, and allowed no deviation from the authorized format. We argued that, having taken this position for its own purposes, it was totally illogical as a matter of law, for the prosecution thereafter to argue guilt by reason of conduct which deviated from authorized conduct, was wholly unauthorized, and, in many cases, was in fact prohibited.

The inconsistent duality of the prosecution's approach to this case is perpetuated in its brief on this appeal. It begins its brief by stating that "The sales dinners were highly organized and employed a set format which had to be followed" (PB 8). On this basis, the prosecution argues that the individual appellants, since they were aware of the content of the "set format" of the sales dinners, were responsible for the representations made within that "set format" (Carity PB 66-67; Daniel Friedman PB 69-70; Hoffman

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THE FIFTH PART OF THE REPORT
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RESULTS OF THE INVESTIGATION OF THE
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ACCIDENT. THE ENGINEER
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The facts of this case are precisely the opposite. As has been indicated, the government produced no evidence that the defendants authorized these acts and statements of salesmen with which the government flooded the record at trial. There was no proof that any individual appellant authorized statements about resale and, indeed, the proof showed that that representation, as well as others that were proved, were specifically prohibited by AMAEP. In the face of this record, it was prejudicial error to allow this idiosyncratic conduct to be charged to the individual appellants by imputing it to the corporate co-defendants, and allow the jury to base corporate criminal liability upon the state of mind of third persons.

In sum, we submit that a determination of criminal liability on the part of the corporations in this case is controlled by this Court's recent decision in Fort v. White, 530 F.2d 1113 (2d Cir. 1976). In the Fort case, plaintiff sought punitive damages from a corporate employer based upon the unauthorized, unknown and specifically prohibited discriminatory conduct on the part of its employees. In affirming the trial court's denial of punitive damages against the employer, this Court recognized the general rule that punitive damages may be levied against an employer for the torts of the

employee only where the corporate employer "in some way authorized, ratified or fostered the acts complained of." Id. 530 F.2d at 1116-1117. A fortiori, it follows that criminal liability may not be issued against or imputed to a corporate employer in identical circumstances.

B. Good Faith

The prosecution totally fails to meet our argument of confusion and prejudice in the court's instruction that no amount of honest belief that no one will lose money can excuse fraudulent conduct (C-FB 48-49). What the prosecution fails to grasp is that if these individual appellants believed that no purchase of Rio Rancho property would ultimately lose money, then that appellant could not conceivably have believed that Rio Rancho property was a bad investment. In short, the prosecution's argument that these appellants could have been guilty of fraud, notwithstanding their honest belief in the long term soundness of Rio Rancho as an investment, rests once again upon its assumption, unproven at trial, that these appellants must have believed, and represented, that a ready resale market was the sine qua non of a good investment in subdivided real estate.

It is interesting that the prosecution relied upon United States v. Dixon, supra, 536 F.2d 1388. That

case found the charges of mail fraud insufficient precisely because the scheme proven had neither the capacity to cause pecuniary injury to the victims nor pecuniary advantage to the defendant. We fail to see how the prosecution can draw any support from that case.

We also argued that the court's instruction on "honest belief" was error since an intent to cause permanent pecuniary injury is an element of mail fraud under this Court's decision in United States v. Regent Office Supply Co., 421 F.2d 1174 (2d Cir. 1970). In that case this Court held that it was incumbent upon the prosecution in a mail fraud case to show that "some actual harm or injury was contemplated by the schemer." Id. 421 F.2d at 1180.

The prosecution says that appellants contend that "even if they did misrepresent the value of lots at Rio Rancho, a good faith belief that no one would suffer permanent pecuniary injury precludes an intent to injure" which is necessary to establish mail fraud. (PB 127) This is a total and flat misstatement of our position. We never contended and do not contend now that the appellants could not be guilty assuming that they wilfully misrepresented the value of lots at Rio Rancho. What we said was that an honest belief that no one would suffer pecuniary injury was inconsistent with a misrepresentation as to value and an intent to defraud. The

prosecution's argument that it is sufficient if a appellant intended to cause a short term injury is once again predicated upon its persistent assumption, unproven at trial, that a lack of short term liquidity is in itself sufficient to establish a lack of value.

VII

THERE WAS NO EVIDENCE BEFORE THE JURY
FROM WHICH IT COULD HAVE PROPERLY CON-
VICTED ON THE INTERSTATE LAND SALES
COUNTS (COUNTS 71, 72, 73, 75 AND 79)

Most of the arguments made in Point VII of the prosecution's brief are sufficiently answered by what we have said previously. (AB 81-91) We will respond only to the prosecution's treatment of the Interstate Land Sales counts (PB 135-39).

Here, once again, the prosecution mistakes appellants' contention. Our point, simply stated, is that since the commercials were introduced outside the presence of the jury, never played for the jury nor ever requested by it there was no way that the jury could have found beyond a reasonable doubt that the commercials were used to sell lots at Rio Rancho. Since the Interstate Land Sales Act (15 U.S.C. § 1703[a]) requires as an essential element of the offense the use of instruments of communication in interstate commerce in selling lots in a subdivision, and the jury had before it no evidence from which it could determine the commercials in counts 71, 72, 73, 75 and 79 were used in selling lots, the convictions on those counts must be reversed. The prosecution's argument that appellants did not object to the introduction of the commercials outside the presence of the jury and never disputed that the commercials were aired (PB 136), is totally beside the

point. Appellants never agreed that the commercials were used in selling lots and never waived a jury trial with respect to that element of the offense.

The prosecution attempts (PB 139) to salvage the convictions on these counts from evidence that Finnerty bought land at Rio Rancho after he had seen an advertisement on television. That testimony does not lead to any inference that the commercials in counts 71, 72, 73, 75 and 79 were used to sell land. Finnerty did not testify he had seen any of the commercials charged in these five counts and did not even testify to what the commercial he did see said (A 264C).

VIII

THERE WAS ERROR RELATING TO FRIEND'S
GRAND JURY TESTIMONY AND EXAMINATIONA. Reading of Grand Jury Testimony

We have argued (C-FB 50-51) that Friend's grand jury testimony, which clearly was admissible only against Friend, should not have been read to the jury until after the trial court had decided whether the almost invisible evidence against Friend constituted a prima facie case. The prosecution does not contest the fact that such a procedure would have been fair and feasible. Instead, the prosecution attempts to minimize the prejudicial impact of Friend's grand jury testimony, and incorrectly represents that the question of prejudice was in any event subsumed by this Court's ruling on the prosecution mandamus petition, which was filed and argued shortly before the commencement of trial.

This Court in fact did not approve the introduction at a joint trial of the specific Friend grand jury testimony of which we complain. This portion of Friend's grand jury testimony appears at A 5964-5970, and elicits Friend's opinion that Rio Rancho would not be fully developed until "many, many, many years beyond my lifetime" (A 5966), and, finally, that Rio Rancho, at its existing rate of growth, would not be

developed for 200 years (A 5969). This portion of Friend's grand jury testimony was not presented as an issue on the mandamus petition, and it therefore is incorrect for the prosecution to state that "this Court has already held that the admission of Friend's testimony would not prevent the defendants from getting a fair, joint trial. . ." (PB 144).

The prosecution also claims that since Friend was stating merely "his own belief" (PB 143 fn.) and "only his own views" (PB 144 fn.), his grand jury testimony could not have prejudiced the appellants. The contrary is true. Indeed, the prejudice was heightened by the very fact that the testimony was a personal opinion on Friend's part and thus was not subject to contradiction by extraneous proof.

As we said previously, the reading of Friend's testimony, "exposed the defendants to the prejudicial speculation of AMREP's own general counsel, which the jury, despite a limiting instruction, could not help but perceive as representing the opinion of all the defendants as to the future development of Rio Rancho" (C-FB 51). In fact, there was no evidence to indicate that any appellant shared Friend's opinion, even were the trustworthiness of Friend's opinion to be assumed, given the coercive atmosphere of a grand jury to a lawyer who had been threatened with indictment by the prosecution and who clearly was hoping to clear himself by adopting a cooperative posture.

No conceivable prejudice could have accrued to the prosecution by receiving Friend's testimony in evidence to complete the record, while at the same time delaying its reading until Friend's motion to dismiss for insufficiency had been decided. It was error to follow the other, highly prejudicial, course.

B. Attorney-Client Privilege and
Six Amendment Rights

We have urged that the indictment should be dismissed by reason of the prosecution's deliberate intrusion into matters protected by the attorney-client privilege, the work product rule, and the defendants' Sixth Amendment right to counsel (C-FB 51-54). The prosecution does not deny that it intruded into these protected areas during its grand jury examination of Friend. It claims, however, that any rights in this regard were waived by the appellants at the time, and that, in any event, the appellants "have failed to pinpoint the documents claimed to be privileged" (PB 145-146). Its argument is unsound.

There was no waiver. Two counsel were present at the hearing before Judge Duffy, namely, Ms. Dacey for AMREP, and Mr. Arkin for the individual defendants. They made clear that theyu did not intend to waive any of their client's rights. The record bears no other fair reading, and the prosecution recognized at the time that it was acting as its peril. The prosecution told Judge Duffy:

"Now getting to the ramifications of producing these documents is really not before your Honor. It is not a ripe issue for litigation. If it comes up at a later time it should be litigated fully before the Court who has the issue before it.

"The issue before your Honor is very limited.

"Can these documents be turned over by Sol Friend to the grand jury? That is the only issue before your Honor, and really the corporation is starting to ask for advisory opinions of the Court as to the effect of turning over the documents which is really not before your Honor in any way that could be intelligently litigated." (A 8659)

Nor is there merit to the claim that "the defendants have failed to pinpoint the documents claimed to be privileged." No such showing is necessary here. The prosecution attempted to offer as evidence at trial certain of the documents which Friend produced with Judge Duffy's permission. Judge Metzner examined them in camera and suppressed them as privileged. There can be no question therefore that privileged materials were seized. The unconstitutional intrusion being clear, it is the prosecution's burden to prove the absence of taint, even assuming that prejudice can be a proper consideration.

In the last respect, it seems telling that the prosecution, which now claims waiver as a defense to its misconduct, made no claim of waiver in offering these privileged documents at the trial. There was no waiver, and there was an intrusion upon privileged and otherwise protected matters, which should be dealt with through the deterrent sanction of dismissal.

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